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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM. 1968.

No. 109.

MARGARET E. SNYDER Also Known as PEG SNYDER,
Petitioner,

vs.

CHARLES HARRIS and EARL W. KIRCHHOFF,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR THE RESPONDENTS.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Eighth Circuit (A. 29-30)[1] is reported at 390 F. 2d 204 (8th Cir. 1968). The opinion of the United States District Court for the Eastern District of Missouri (A. 21-28) is reported at 268 F. Supp. 701 (E. D. Mo. 1967).

JURISDICTION.

The Judgment of the United States Court of Appeals for the Eighth Circuit was entered on February 27, 1968 (A. 31). Petitioner's Petition for Rehearing, or in the

[1] "A" references are to the appendix filed herein by petitioner.

Alternative, to Transfer to the Court En Banc, was denied on March 22, 1968 (A. 43). Petitioner's Petition for a Writ of Certiorari was filed May 17, 1968 and was granted October 21, 1968 (A. 46, ... U. S. ..., 89 Sup. Ct. 232 (1968)). The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

QUESTION PRESENTED.

Whether under Rule 23 of the Federal Rules of Civil Procedure, as amended February 28, 1966, effective July 1, 1966, aggregation of several and distinct claims is permitted for the purpose of satisfying the diversity jurisdictional amount requirement of 28 U. S. C., § 1332, where aggregation was not permitted prior to the amendment of Rule 23.

STATUTE AND RULES INVOLVED.

28 U. S. C., §1332 (a) (1), provides:

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
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> (1) citizens of different States;"

Fed. R. Civ. P. 23, as amended February 28, 1966, effective July 1, 1966, is set forth in full in Appendix A attached hereto, infra, pp. A-1–A-4.

Fed. R. Civ. P. 82, as amended February 28, 1966, effective July 1, 1966, provides in pertinent part:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

STATEMENT.

On November 23, 1966 petitioner filed her complaint in the United States District Court for the Eastern District of Missouri against the respondents herein and National Western Life Insurance Company (hereinafter referred to as National Western) as a class action pursuant to Fed. R. Civ. P. 23, as amended February 28, 1966, effective July 1, 1966, to recover judgment for $1,200,000.00 (A. 6-10). Petitioner filed an amended complaint against only the respondents on March 14, 1967 (A. 14-18). The relevant portions of the amended complaint allege as follows:

Petitioner is a citizen of the State of Arizona and respondents are citizens of the State of Missouri; that there is diversity of citizenship and the amount in controversy exceeds $10,000.00; that since prior to November 22, 1966, petitioner has been a shareholder of Missouri Fidelty/ Union Trust Life Insurance Company (hereinafter referred to as Missouri Fidelity) and owns 2,000 shares of said company; that the by-laws of Missouri Fidelity provide for a board of directors consisting of fifteen directors; that at all times relevant to this action, the respondents were members of said board of directors and the market price was about $2.63 per share; that prior to November 22, 1966, National Western submitted to the Missouri Fidelity directors a proposal to purchase for $7.00 per share all of the shares of Missouri Fidelity owned by them, on the condition that all directors of Missouri Fidelity, except four, resign as directors of Missouri Fidelity and that five nominees of National Western be elected directors of Missouri Fidelity, and that said nominees be designated and elected so as to constitute a majority of the executive and investment committees of Missouri Fidelity; that pursuant to said offer, on or about November 22, 1966, National Western entered into an agreement with eight Missouri Fidelity directors including respondents, to pay to

them and to friends and relatives of theirs $7.00 per share for an aggregate of approximately 300,000 shares of Missouri Fidelity, and thereupon and in pursuance of such conduct said eight directors resigned as directors of Missouri Fidelity; and nominees of National Western were designated and elected as directors and as a majority of the executive and investment committees of Missouri Fidelity; that the aforesaid conduct and acts of the eight directors were a breach of trust and a violation of their duties as directors of Missouri Fidelity, and National Western procured said resignations and therefore paid or agreed to pay the eight directors who resigned, and their friends or relatives a premium of about $1,200,000.00; and that the aggregate amount paid by National Western was approximately $1,200,000.00 in excess of the market value of said shares and was a premium paid to the selling shareholders for the resignations of said directors who resigned and for obtaining control of the executive and investment committees of Missouri Fidelity.

The amended complaint prayed that judgment in the amount of $1,200,000.00 be entered in favor of petitioner and the other individual shareholders (allegedly over 4,000 in number) according to their respective share holdings (A. 14-18; See also the opinion of the district court, A. 21-23, 268 F. Supp. 701 (E. D. Mo. 1967)).

On March 27, 1967, the respondents filed their Motion to Dismiss the amended complaint, alleging as one of their grounds "that the Court lacks jurisdiction as the amount in controversy is less than $10,000.00" (A. 20).

The district court dismissed the amended complaint without prejudice on April 27, 1967, holding that the Court lacked jurisdiction in that the amount in controversy did not exceed $10,000.00 (A. 21-28).[2] In arriving at this de-

[2] Since petitioner owned only 2,000 shares of Missouri Fidelity and the difference between the market price of the

cision, the court ruled that petitioner could not aggregate her claim with those of others in the class, because the petitioner's claim was separate and distinct from other persons in the class, and Rule 23, as amended, in no way purports to affect the jurisdiction of the court, nor change the character of a plaintiff's right. The district court further held that to construe Amended Rule 23, so as to confer jurisdiction, would constitute a violation of Fed. R. Civ. P. 82 (A. 23-28; 268 F. Supp. 701, 702-704 (E. D. Mo. 1967)).

The Court of Appeals for the Eighth Circuit in a Per Curiam opinion affirmed the district court "on the basis of the district court's soundly reasoned opinion and the opinion of the Fifth Circuit in **Alvarez v. Pan American Life Insurance Company**, 375 F. 2d 992 (5th Cir. 1967), **cert. denied**, 389 U. S. 827 (1967)" (A. 29; 390 F. 2d 204 (8th Cir. 1968)). In so holding, the court stated:

> "We are not persuaded from our study of amended Rule 23 and the Advisory Committee notes to conclude that the amendment of the Rule was designed or did in fact change the substantive law proscribing the aggregation of separate and distinct claims in a class action for purposes of conferring jurisdiction under Section 1332" (A. 30; 390 F. 2d 204, 205 (8th Cir. 1968)).

After the denial of a Petition for Rehearing, or in the Alternative, to Transfer to the Court En Banc (A. 43), a petition for a writ of certiorari was filed in this Court on May 17, 1968, and the writ was granted on October 21, 1968 (A. 46; ... U. S. ..., 89 Sup. Ct. 232 (1968)).

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stock at the time of the matter complained of ($2.63 per share) and the price respondents received ($7.00 per share) was $4.37 per share, if petitioner cannot aggregate her claims with the other members of the class, the amount in controversy is only $8,740.00.

ARGUMENT.

The Amendment of Rule 23 of the Federal Rules of Civil Procedure Does Not Permit the Aggregation of Several and Distinct Claims for the Purpose of Satisfying the Diversity Jurisdictional Amount Requirement of 28 U. S. C., § 1332.

The allegations of the petitioner's complaint and all of the surrounding facts and circumstances clearly indicate that her claim is separate and distinct from the other members of the class. Although there appear to be questions of law and fact common to the class, as petitioner contends (P. Br. 10),[3] still in the end each member of the class would be required individually to prove his separate claim against respondents. Petitioner further evidences the separate and distinct character of her claim by filing two separate identical actions against different directors of Missouri Fidelity in other district courts. See, **Snyder v. Polland,** No. 66-1938-CC, U. S. Dist. Ct. C. D. Cal., July 31, 1967 and **Snyder v. Epstein,** 290 F. Supp. 652 (E. D. Wis. 1968) (P. Br. Appendix B).[4] Moreover, a separate suit in the form of a derivative action has been filed by a dissident shareholder of Missouri Fidelity in the state courts of Missouri against all of the directors of Missouri Fidelity and others, including respondents. **Ritchey v. Missouri Fid./Union Trust Life**

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[3] The Brief for the Petitioner on the merits is herein referred to as "P. Br."

[4] The District Court for the Central District of California in **Snyder v. Polland,** granted the defendants' motion to dismiss in an order entered July 31, 1967 inter alia on grounds of lack of jurisdictional amount. The District Court for the Eastern District of Wisconsin in **Snyder v. Epstein,** denied defendants' motion to dismiss in an opinion and order entered October 22, 1968, which is Petitioner's Appendix B.

Ins. Co., No. 280008, Circuit Ct. St. Louis County, Mo. Indeed, heretofore petitioner has recognized the separate and distinct nature of her claim,[5] and Judge Harper in the memorandum opinion and order of the District Court and the Court of Appeals for the Eighth Circuit have so found (A. 27-28, 30; **Snyder v. Harris**, 268 F. Supp. 701, 704 (E. D. Mo. 1967), aff'd, 390 F. 2d 204 (8th Cir. 1968). Nevertheless, similar cases provide authority for asserting the separate and distict character of petitioner's claim from those of other shareholders. See e. g., **Knapp v. Bankers Securities Corp.**, 17 F. R. D. 245 (E. D. Pa. 1954), aff'd 230 F. 2d 717 (3d Cir. 1956); **Ames v. Mengel Co.**, 190 F. 2d 344 (2d Cir. 1951); **Fisch v. General Motors Corp.**, 169 F. 2d 266 (6th Cir. 1948); **Goldberg v. Whittier Corp.**, 111 F. Supp. 382 (E. D. Mich. 1953); **Giesecke v. Denver Tramway Corp.**, 81 F. Supp. 957 (D. Del. 1949).

Traditionally, courts have held that separate and distinct claims of two or more plaintiffs may not be aggregated to arrive at the jurisdictional amount, whereas aggregation is permitted if the several plaintiffs unite to

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[5] In Appellant's Brief in the Court of Appeals in the case at bar, it is stated at p. 24: "The instant case demonstrates the impact of the revision. This cause of action formerly was known as a 'spurious' class action."

The petition for a Writ of Certiorari filed herein on May 17, 1968 states at p. 8: "Prior to the amendment of Federal Rule 23 the action here involved would have been classified as a 'spurious' class action and the aggregation of claims to satisfy the jurisdictional amount requirement of 28 U. S. C., Section 1332, would not have been permitted."

Of course, under former Fed. R. Civ. P. 23 (a) (3) (spurious class actions) the claims of the members of the class were separate and distinct, since former Fed. R. Civ. P. 23 (a) (3) provided that: "The right sought to be enforced for or against the class is several and there is a common question of law or fact affecting the several rights and a common relief is sought." 2 Barron & Holtzoff, **Federal Practice and Procedure**, § 569, at 321-24 (Wright ed. 1961); 3A Moore, **Federal Practice**, § 23.10, at 3442-44 (2d ed. 1968).

enforce a single title or right in which they have a common and undivided interest. **Troy Bank of Troy, Ind. v. G. A. Whitehead, & Co.**, 222 U. S. 39 (1911); **Pinel v. Pinel**, 240 U. S. 594 (1916); **Scott v. Frazier**, 253 U. S. 243 (1920); **Lion Bonding & Sur: Co. v. Karatz**, 262 U. S. 77 (1923); **Clark v. Paul Gray, Inc.**, 306 U. S. 583 (1939); **Thomson v. Gaskill**, 315 U. S. 442 (1942); **Fuller v. Volk**, 351 F. 2d 323 (3d Cir. 1965); **Alphonso v. Hillsborough County Aviation Authority**, 308 F. 2d 724 (5th Cir. 1962); 1 Barron & Holtzoff, Federal Practice and Procedure, § 24 at 114-17 (Wright ed. 1961); 1 Moore, **Federal Practice**, ¶ 10.97 at 889-95 (2d ed. 1964). The reason for that well established aggregation doctrine is that where the claims of two or more plaintiffs are separate and distinct, were it not for some multiple joinder device permitting the litigation in one single action for convenience and economy, two or more independent causes of action, each requiring the jurisdictional amount, would be required. However, if several plaintiffs are united to enforce a single title or right in which there is a common and undivided interest, a single cause of action could always have been maintained, because only that single right is in controvery.[6]

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[6] Support for this reasoning is found in a comparison of Fed. R. Civ. P. 19, 20 and 23. Under both former Rule 19, and as amended, all persons seeking to enforce a single title or right in which there is a common and undivided interest would be required to be joined and the court must order that they be made a party, if not joined. Former Rule 19 (a) and amended Rule 19 (d) also provide an exception to such required joinder in cases arising under Fed. R. Civ. P. 23, where one or more members of the class would be permitted to sue or be sued, provided the provisions of Rule 23 were complied with. Where, however, the claims are separate and distinct, joinder of the parties is not required, but merely permitted under both former and amended Fed. R. Civ. P. 20 (a), and under Fed. R. Civ. P. 20 (b), the court may order separate trials. Further, where permissive joinder of all of the members of the class is impracticable, because the class is so numerous, a class action under Fed. R. Civ. P. 23, both formerly and as amended can be maintained, provided there is compliance with Rule 23. Thus, in the

See, 1 Moore, **Federal Practice**, ¶ 10.97, at 889-90 (2d ed. 1964); 3 A Moore, **Federal Practice**, ¶ 23.13, at 3477-78 (2d ed. 1968).

Petitioner, however contends that because of the amendment of Fed. R. Civ. P. 23 to reflect the "consequences" of the class action, rather than the "jural" relationship of the members of the class, the settled doctrine of not permitting aggregation of separate and distinct claims is no longer applicable with respect to Fed. R. Civ. P. 23, as amended. Such contention completely ignores the concept of Federal diversity jurisdiction and in view of the history of the aggregation doctrine is totally fallacious.

The right to maintain an action in the Federal district court by reason of diversity of citizenship is not derived from the Constitution, but is permitted only insofar as is established by Congress. **Kline v. Burke Construction Co.**, 260 U. S. 226, 233-34 (1922); **Stevenson v. Fain**, 195 U. S. 165 (1904). For by Article III, § 1 "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U. S. Const., Art. III, § 1. By § 2 of the same Article, it is provided that "[t]he judicial Power shall extend . . . to Controversies . . . between Citizens of different States;" and that in such controversies, "the supreme Court shall have appellate Jurisdiction . . ." U. S. Const. Art. III, § 2.[7] Thus,

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former "true" class action, the concept of "totality" was present and aggregation was permitted. Such totality was not present in former "hybrid" and "spurious" class actions, and is not present in actions under Fed. R. Civ. P. 23 (b) (3) as amended.

[7] U. S. Const., Art. III, in pertinent part provides as follows:

"Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . .

"Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of

only Congress has been granted authority to establish the diversity jurisdiction requirements of the lower Federal courts. However, since the inception of Federal diversity jurisdiction, Congress has always imposed a jurisdictional amount (gradually increasing the amount to the present $10,000.00) as a method of restricting access to the lower Federal courts.[8] 1 Moore, **Federal Practice**, ¶ 0.90, at 817-18 (2d ed. 1964); 1 Barron & Holtzoff, **Federal Practice and Procedure**, § 24, at 102 (Wright ed. 1961). Cognizant of the Congressional intent in imposing and increasing the jurisdictional amount, this Court has always called for a policy of strict construction of jurisdictional statutes. **Thomson v. Gaskill**, 315 U. S. 442, 446

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the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

[8] The Judiciary Act of 1789, § 11, 1 Stat. 78 (1789), Rev. Stat. § 629 (1875) was the first Congressional Act providing for Federal diversity jurisdiction and imposed a jurisdictional amount of $500.00. Thereafter, in 1887 the jurisdictional amount was increased to $2,000.00, Act of March 3, 1887, ch. 373, § 1, 24 Stat. 552 (1887); in 1911 to $3,000.00, Act of March 3, 1911, ch. 234, § 24, par. 1, 36 Stat. 1091 (1911); and in 1958 to $10,000.00, Act of July 25, 1958, Pub. L. 85-554, 85th Cong., 2d Sess., 72 Stat. 415 (1958). The legislative history of the Act of July 25, 1958 contained at 2 U. S. Code, Cong. & Ad. News 3099-101 (1958) discloses that the reason for increasing the jurisdictional amount in 1958 was the increasing number of Federal cases between 1911 and 1958.

(1942); **Healy v. Ratta,** 292 U. S. 263, 270 (1934). In construing jurisdictional statutes, courts have developed a substantive law of jurisdiction, not to be confused with the procedural law dealing with the rules of pleading and practice.

The aggregation doctrine, with respect to jurisdictional amount, is one aspect of the substantive law of jurisdiction which has emerged from court decisions. As early as 1832, Mr. Justice Story applied the aggregation doctrine to the limited appellate jurisdiction of the Supreme Court in **Oliver v. Alexander,** 31 U. S. (6 Pet.) 143 (1832). In that case, the Federal Circuit Court had issued separate decrees in favor of certain officers and seamen (libelants) for wages and interest. The sums so decreed in no case exceeded $900.00 and most of them were less than $500.00. The assignee in whose hands the funds for payment were attached appealed to the Supreme Court. A motion to dismiss the appeal was filed on the ground that the amount in controversy was less than the required $2,000.00 for jurisdiction in the Supreme Court. The Court found the claims to be separate and distinct and dismissed the appeal. In so holding, this Court stated:

> "One seaman cannot appeal from the decree made in regard to the claim of another, for he has no interest in it, and cannot be aggrieved by it. The controversy, so far as he is concerned, is confined solely to his own claim; and the matter of dispute between him and the owners, or other respondents, is the sum or value of his own claim, without any reference to the claims of others. It is very clear, therefore, that no seaman can appeal from the District Court to the Circuit Court unless his own claim exceeds fifty dollars; nor from the Circuit Court to the Supreme Court unless his claim exceeds two thousand dollars. And the same rule applies to the owners or other respond-

ents, who are not at liberty to consolidate the distinct demands of each seaman into an aggregate, thus making the claims of the whole the matter in dispute; but they can appeal only in regard to the demand of a seaman which exceeds the sum required by law for that purpose, as a distinct matter in dispute." 31 U. S. (6 Pet,) 147-48 (1832).

Thereafter, the aggregation doctrine as applicable with respect to appellate jurisdictional amount was reiterated in numerous cases. See, e. g., **Stratton v. Jarvis**, 33 U. S. (8 Pet.) 4 (1834); **Spear v. Place**, 52 U. S. (11 How.) 522 (1850); **Rich v. Lambert**, 53 U. S. (12 How.) 347 (1851); **Shields v. Thomas**, 58 U. S. (17 How.) 3 (1854); **Seaver v. Bigelow**, 72 U. S. (5 Wall.) 208 (1867); **Paving Co. v. Mulford**, 100 U. S. (10 Otto) 147 (1879); **The Connemara**, 103 U. S. (13 Otto) 754 (1881); **Russell v. Stansell**, 105 U. S. (15 Otto) 303 (1882); **The Mamie**, 105 U. S. (15 Otto) 773 (1881); **Ex Parte Baltimore & Ohio R. R. Co.**, 106 U. S. (16 Otto) 5 (1882); **Farmers' Loan & Trust Co. v. Waterman**, 106 U. S. (16 Otto) 265 (1882); **Adams v. Crittenden**, 106 U. S. (16 Otto) 576 (1882); **Hawley v. Fairbanks**, 108 U. S. 543 (1883); **Stewart v. Dunham**, 115 U. S. 61 (1885); **Henderson v. Wadsworth**, 115 U. S. 264, 276 (1885); **Gibson v. Shufeldt**, 122 U. S. 27 (1887); **Clay v. Field**, 138 U. S. 464 (1891); **Ogden City v. Armstrong**, 168 U. S. 224 (1897).

At least as early as 1893, the aggregation doctrine was applied by this Court to the jurisdiction of the lower Federal courts in **Walter v. Northeastern R. R. Co.**, 147 U. S. 370 (1893), and has been preserved by many decisions of this Court. **Wheless v. St. Louis**, 180 U. S. 379 (1901); **Troy Bank of Troy, Ind. v. G. A. Whitehead**, 222 U. S. 39 (1911); **Rogers v. Hennepin County**, 239 U. S. 621 (1916); **Pinel v. Pinel**, 240 U. S. 594 (1916); **Scott v. Frazier**, 253 U. S. 243 (1920); **Lion Bonding & Sur. Co. v. Karatz**, 262

U. S. 77 (1923); **Sovereign Camp, Woodmen of the World v. O'Neill**, 266 U. S. 292, 295, (1924); **Clark v. Paul Gray, Inc.**, 306 U. S. 583 (1939);[9] **Gibbs v. Buck**, 307 U. S. 66 (1939); **Buck v. Gallagher**, 307 U. S. 95 (1939); **Thomson v. Gaskill**, 315 U. S. 442 (1942). As eventually developed, the aggregation doctrine is delineated by the following statement in **Troy Bank of Troy, Ind. v. G. A. Whitehead**, 222 U. S. 39, 41 (1911):

> "When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount."[10]

The history of the aggregation doctrine, therefore, leads to the inescapable conclusion that the doctrine is not tied to the Federal Rules of Civil Procedure.

It was not until June 19, 1934, more than a century after the aggregation doctrine originated, that Congress gave the Supreme Court power to enact the Federal Rules of Civil Procedure. Act of June 19, 1934, ch. 651, §§ 1, 2, 48 Stat. 1064 (1934). Thereafter, when the Federal Rules of Civil Procedure were promulgated, the aggregation doctrine was applied to all multiple joinder devices, under the Federal rules, which permitted two or more parties or claims to be united in a single suit. Thus, the doctrine

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[9] In **Clark v. Paul Gray, Inc.**, 306 U. S. 583 (1939), this Court on its own initiative applied the aggregation doctrine to find the jurisdictional amount lacking in the lower court. Previously, this Court had applied the aggregation doctrine without motion by a party, in a case of appellate jurisdiction in **Ogden City v. Armstrong**, 168 U. S. 224 (1897).

[10] Most of the cases heretofore cited express the aggregation doctrine in comparable language. Language almost identical in form was employed in **Pinel v. Pinel**, 240 U. S. 594, 596 (1916).

has been applied with respect to cases of permissive joinder under Fed. R. Civ. P. 20; **Eagle Star Ins. Co. v. Maltes**, 313 F. 2d 778 (5th Cir. 1963); **Aetna Ins. Co. v. Chicago, R. I. and Pacific R. R. Co.**, 229 F. 2d 584 (10th Cir. 1956); **Manufacturers Cas. Ins. Co. v. Coker**, 219 F. 2d 631 (4th Cir. 1955); **Fechheimer Bros. Co. v. Barnwasser**, 146 F. 2d 974 (6th Cir. 1945); actions permitting joinder of claims under Fed. R. Civ. P. 18; **Alberty v. Western Sur. Co.**, 249 F. 2d 537 (10th Cir. 1957); causes dealing with real parties in interest under Fed. R. Civ. P. 17 (a) and intervention under Fed. R. Civ. P. 24; **Phoenix Ins. Co. v. Woosley**, 287 F. 2d 531 (10th Cir. 1961); **United Steelworkers of America v. New Park Min. Co.**, 169 F. Supp. 107, 113-14 (D. Utah 1958), reversed on other grounds, 273 F. 2d 352 (10th Cir. 1959); as well as class actions under former Fed. R. Civ. P. 23; **Fuller v. Volk**, 351 F. 2d 323 (3d Cir. 1956); **Alfonso v. Hillsborough County Aviation Authority**, 308 F. 2d 724 (5th Cir. 1962); **Troup v. McCart**, 238 F. 2d 289 (5th Cir. 1956); **Matlaw Corp. v. War Damage Corp., 164 F. 2d 281 (7th Cir. 1947).**[11] Accordingly, since the aggregation doctrine attaches no special significance to class actions under Rule 23, but applies in all instances where two or more parties or claims are united in a single suit, it is inconceivable that the mere amendment of Rule 23 has ipso facto abrogated the aggregation doctrine with respect to class actions as petitioner contends.

Certainly, to allow the amendment of Rule 23 to confer jurisdiction where prior to the amendment there was none, contemplates permitting court made rules of

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[11] With respect to class actions under former Fed. R. Civ. P. 23, the multiple joinder device particularly pertinent to the instant case, aggregation of claims to meet jurisdictional amount was permitted in "true" class actions, in which the right to be enforced was joint or common, but not in "hybrid" or "spurious" class actions in which there was no joint interest or right. 2 Barron & Holtzoff, **Federal Practice and Procedure**, § 569, at 321-22 (Wright ed. 1961).

procedure to modify and enlarge the statutory jurisdiction of Federal courts. But such ability of the Federal Rules of Civil Procedure to expand jurisdiction would directly conflict with Fed. R. Civ. P. 82, as well as decisions of the courts. **Sibbach v. Wilson & Co.**, 312 U. S. 1, 10 (1941); **United States v. Sherwood**, 312 U. S. 584, 589-90 (1941); **Sturgeon v. Great Lakes Steel Co.**, 143 F. 2d 819, 822 (6th Cir. 1944).[12]

Indeed, recent judicial decisions recognizing the jurisdictional nature of the aggregation doctrine have held that the amendment of Fed. R. Civ. P. 23 does not abrogate the doctrine that separate and distinct claims may not be aggregated. **Snyder v. Harris**, 268 F. Supp. 701 (E. D. Mo. 1967), aff'd, 390 F. 2d 204 (8th Cir. 1968); **Alvarez v. Pan American Life Ins. Co.**, 375 F. 2d 992 (5th Cir.), **cert. denied**, 389 U. S. 827 (1967); **Lesch v. Chicago & E. Ill. R. R. Co.**, 279 F. Supp. 908 (N. D., Ill. 1968); **Pomierski v. W. R. Grace & Co.**, 282 F. Supp. 385 (N. D., Ill. 1967); **DeLorenzo v. Fed. Dep. Ins. Corp.**, 259 F. Supp. 193, 195 n. 5 (S. D. N. Y. 1966).[13]

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[12] In **Sibbach v. Wilson & Co.**, 312 U. S. 1, 10 (1941), this Court stated:

> "There are other limitations upon the authority to prescribe rules which might have been but were not mentioned in the Act [of June 19, 1934]; for instance, the inability of a court by rule to extend or restrict the jurisdiction conferred by a statute."

The same year, the Supreme Court again stated in **United States v. Sherwood**, 312 U. S. 584, 589-90 (1941):

> "An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction and the Act of June 19, 1934, 48 Stat. at L. 1064, chap. 651, 28 U. S. C. A., §723b, authorizing this Court to prescribe rules of procedure in civil actions gave it no authority to modify, abridge or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of Federal Courts."

[13] Since the actual decision in **DeLorenzo v. Fed. Dep. Ins. Corp.**, 259 F. Supp. 193 (S. D. N. Y. 1966), was based on former

In **Alvarez v. Pan American Life Ins. Co.**, *supra*, one appellant owned an insurance contract issued by appellee in the amount of $1,000.00. The Castro government expropriated appellee's assets in Cuba and for this reason payment on the contract was refused. Said appellant's suit was based on a claim that a bonus accrued later under the contract, and was for the amount due him, and such sums as were due other Cuban Nationals holding contracts with similar bonus provisions. The class was said to include more than 5,000 such contract holders. The second appellant was the holder of an insurance contract with appellee in the amount of $5,000.00. He sought his contract rights and those of all other Cuban National policyholders similarly situated. Both actions were dismissed by the district court for lack of jurisdictional amount. The Court of Appeals for the Fifth Circuit unanimously affirmed the district court, stating:

> "In sum, it would appear that the principle of aggregation falls within the scope of jurisdiction which has been traditionally left to Congress rather than in the rule making power delegated to the Supreme Court by Congress. It follows that the principle is valid and subsisting notwithstanding new Rule 23."[14] 375 F. 2d 992, 996 (5th Cir. 1967).

Fed. R. Civ. P. 23, the court's comments on application of the aggregation doctrine to amended Rule 23 was a matter of dictum.

[14] Judge Frankel, U. S. District Judge for the Southern District of New York, approved the **Alvarez** decision at the Eight Circuit's Judicial Conference, September 18, 1967 in the following manner:

> ". . . The result [in **Alvarez v. Pan American Life Ins. Co.**] is debatable, but I suggest it is correct. While there appeared to be questions common to the class, each policyholder would evidently be required in the end to prove his separate claim individually. There was no certainty or necessity that all of the claims would have to be resolved one way. It would be artificial, and erroneous as a matter of

In **Pomierski v. W. R. Grace & Co.**, 282 F. Supp. 385 (N. D. Ill. 1967) the court dismissed Count I of plaintiff's complaint for lack of jurisdictional amount, refusing to allow plaintiff to aggregate her claims with other members of the class. After citing and quoting from **Alvarez v. Pan American Life Ins. Co.**, *supra*, and the district court opinion in the instant case, the court stated:

> "If I were to accept plaintiff's position regarding aggregation, I would be acting in violation of Rule 82 and of well established precedents indicating the importance of the nature of the interests asserted in a class action when aggregation is sought (cit. omitted).
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> * * * * * * *
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> "* * * As an additional reason why this determination should not be altered, it must be noted that the principles which have heretofore governed the question of aggregation in class actions have also applied in non-class suits involving multiple plaintiffs (cit. omitted). If I were to hold that aggregation in a class suit is dependent solely upon compliance with Rule 23, that would create one rule for aggregation in class suits and a different rule in ordinary, multiple plaintiff actions involving the same type of claims." 282 F. Supp. 385, 391 (N. D. Ill. 1967).

See also **Lesch v. Chicago & E. Ill. R. R. Co.**, 279 F. Supp. 908, 911-12 (N. D. Ill. 1968).

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substance, to treat the sum of the claims as a unitary and indivisible 'amount in controversy.'

. . . . . .

". . . For better or for worse, Congress has exercised its unquestioned power to set a lower financial limit for most areas of federal jurisdiction. Unless there is at least one party entitled to open the door, the federal court remains closed. And there are many, at least, who see this as no tragedy, certainly so far as the diversity jurisdiction is concerned. Frankel, **Some Preliminary Observations Concerning Civil Rule 23**, 43 F. R. D. 39, 50-51 (1967).

Contrary to the above authority are the cases of **The Gas Service Co. v. Coburn**, 389 F. 2d 831 (10th Cir. 1968); **Booth v. General Dynamics Corp.**, 264 F. Supp. 465 (N. D. Ill. 1967); and **Snyder v. Epstein**, 290 F. Supp. 652 (E. D. Wis. 1968). Respondents submit that those cases are erroneously decided. **The Gas Service Co.** case, upon which petitioner places great reliance, cites only one precedent involving federal jurisdiction in diversity class actions, **Gibbs v. Buck**, 307 U. S. 66 (1939), as authority for its holding. In **Gibbs v. Buck**, however—an injunction suit under former Equity Rule 38 on behalf of members of an unincorporated association, in which each representative of the association possessed the requisite jurisdictional amount—aggregation was permitted, because there was a common and undivided interest in the matter in controversy. 307 U. S. 66 at 74 (1939). See also, **Buck v. Gallagher**, 307 U. S. 95, 103 (1939).[15] Nothing within the holding of **Gibbs v. Buck** purported to authorize the aggregation of claims in the absence of such common and undivided interest. This is borne out by **Clark v. Paul Gray, Inc.**, 306 U. S. 583 at 588-89 (1939), decided the same day and citing **Gibbs v. Buck**, where aggregation was not permitted because there was not shown a joint and undivided interest in the subject matter of the suit. Thus, the Tenth Circuit in **The Gas Service Co.** case, has misconstrued the decision of **Gibbs v. Buck**, which decision is contrary to

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[15] **Hilliker v. Grand Lodge K. P.**, 112 F. 2d 382, 384 (6th Cir. 1940), commenting upon the cases of **Gibbs v. Buck** and **Buck v. Gallagher**, states:

> "The recent decisions of the Supreme Court in Gibbs v. Buck . . . and Buck v. Gallagher . . . do not alter the rule governing aggregation, for the court was careful to point out in each of its opinions that the members of the Association there complaining had each a common and undivided interest in the right which they sought to protect from the effects of the State Statute there assailed, and the dissenting opinion gives emphasis to this basis for decision. . . ."

the holding of **The Gas Service Co.** case and in fact supports the respondents herein. The only other authority cited by **The Gas Service Co.** case as comfort for its holding, **Provident Tradesmen's Bank & Trust Co. v. Patterson,** 390 U. S. 102 (1968), is totally inapposite, since the **Provident Tradesmen's Bank & Trust Co.** case dealt neither with Federal Jurisdiction nor amended Rule 23, but rather amended Fed. R. Civ. P. 19, as to findings of "indispensability".

Moreover, **Booth v. General Dynamics Corp.,** 264 F. Supp. 465 (N. D. Ill. 1967), also relied upon by petitioner, erroneously ignores the independent determination to be made as to whether a class action is properly maintained as distinguishable from the independent determination of whether the $10,000.00 minimum amount is in controversy.[16] Further, the **Booth** case ties the aggregation

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[16] The district court in **Lesch v. Chicago & E. Ill. R. R. Co.,** 279 F. Supp. 908, 911 (N. D. Ill. 1968), probably recognizing the error of **Booth v. General Dynamics Corp.,** cites the **Booth** case as contrary to the following statement:

> "Nevertheless, the determination of whether a class action is properly so maintained, must be made independently of the determination of whether the requisite $10,000 minimum amount is in controversy."

Additionally, **Lesch v. Chicago & E. Ill. R. R. Co.,** points out the nexus between former and amended Fed. R. Civ. P. 23, with respect to aggregation in the following manner at p. 912, n. 2:

> "2. Rule 23 of the Federal Rules of Civil Procedure, as revised is sometimes said to have obliterated the distinction between true, hybrid and spurious class actions. This is true only where the question is, whether a class action is properly so maintained or whether the judgment is binding upon all members of the class. In determining whether the minimum jurisdictional amount is in controversy, a District Court must treat any application for a class action as a case of multiple joinder of parties. Insofar as 'true', 'hybrid', and 'spurious' characterize the nature of the right being enforced, they remain as useful analytical terms, even after the revision to Rule 23, where the question as to jurisdictional amount is raised."

doctrine solely to class actions, whereas it has been shown that the aggregation doctrine applies equally in non-class suits involving multiple parties.[17]

Insofar as **Snyder v. Epstein**, 290 F. Supp. 652, 657-58 (E. D. Wis. 1968), relies as the basis for its reasoning, on **The Gas Service Co. v. Coburn** and **Booth v. General Dynamics Corp.**, cases, respondents suggest that such reliance is misplaced.

Additionally, all three of the cases (**The Gas Service Co. v. Coburn**, **Booth v. General Dynamics Corp.**, and **Snyder v. Epstein**) in one fashion or another adopt a convenience or economy approach by asserting that the utility of amended Rule 23 would be defeated, if aggregation of the separate and distinct claims were not permitted. Such a convenience or economy approach, however, is invalid for three reasons:

(1) Under the aggregation doctrine convenience or economy can be no justification for permitting separate and distinct claims joined in one suit to be aggregated;

(2) Application of the aggregation doctrine to amended Rule 23 in no way perpetuates distinctions between "true", "hybrid", and "spurious", since each suit brought under amended Rule 23 requires a new determination as to whether the claims are separate and distinct; and

(3) Federal courts have always been closed to those multitudinous litigants, who, where aggregation is not permitted, lack the jurisdictional amount. Their recourse has been in the state courts.

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[17] That the aggregation doctrine is applicable to non-class suits involving multiple parties was one of the reasons for the holding of **Pomierski v. W. R. Grace & Co.**, 282 F. Supp. 385, 391 (N. D. Ill. 1967).

Petitioner in her conclusion, asserts such a convenience or economy argument by stating that "The consequence of dismissal would be to thrust individual shareholders into state courts to institute these actions thus encouraging hundreds of suits flung out across the country with the consequent likelihood of disparate judgments. The cost of prosecuting the claims would be enormous both to the defendants and to the plaintiffs" (P. Br. 16-17). Petitioner's conclusion is invalid for the three reasons set out above. In addition, it should be noted that petitioner can bring a class action in Missouri under Mo. Sup. Ct. Rule 52.08, which is the same as former Fed. R. Civ. P. 23, and avoid having "hundreds of suits flung out across the country."

Petitioner's argument, moreover, is misplaced in two other ways. First, the case of **Texas Employers Ins. Assn. v. Felt**, 150 F. 2d 227 (5th Cir. 1945), is not pertinent to the case at bar, since **Alvarez v. Pan American Life Insurance Co.**, 375 F. 2d 992 (5th Cir. 1967), also out of the Fifth Circuit, is a subsequent case directly involving the question here presented. In any event, the question here presented is not whether a suit under Fed. R. Civ. P. 23 (b) (3), which binds all of the members of the class, is as a procedural matter properly maintainable,[18] but rather whether Rule 23, as amended,

[18] **Texas Employers Ins. Assn. v. Felt**, 150 F. 2d 227, 231 (5th Cir. 1945), as applied by petitioner to the instant case, decided whether a single suit could be maintained under Fed. R. Civ. P. 20. In so deciding, the court also commented that Fed. R. Civ. P. 20 in and of itself "does not affect jurisdiction." 150 F. 2d at 231. This respondents do not deny. However, respondents contend that the Federal Rules of Civil Procedure cannot be applied in such a manner as to extend jurisdiction. Clearly, the court in **Texas Employers** realizes this as it states at 150 F. 2d 232: "If as we think no rule of procedure requires this suit to be split into separate parts, let us see if federal jurisdictional limitations demand it; **if so, procedural convenience must yield to jurisdictional necessity**" (Emphasis supplied).

can so operate as to extend jurisdiction, by permitting aggregation of separate and distinct demands where prior to the amendment such aggregation was not permitted.

Secondly, petitioner misconstrues the effect of Fed. R. Civ. P. 23 (b) (3), as amended, which makes the members of the class bound by the judgment unless they exclude themselves under subdivision (c) (2) of the rule.[19] Thus, petitioner states: "How is it possible to say in the instant case that the 'amount in controversy' does not exceed $10,000 where there could be one judgment in excess of $1,000,000 binding the whole class and in which members of the class would be bound (unless they exclude themselves as above mentioned) regardless whether or not they joined in the lawsuit?" (P. Br. 11). Of course, this statement is erroneous to begin with, because even if the members of the class had been joined as parties under Fed. R. Civ. P. 20, where they would also have been bound by the judgment, the aggregation doctrine would still apply. Thus, it makes no difference whether Rule 23, as amended, now makes the members of the class bound by the judgment; what matters is whether the demands of the members of the class are separate and distinct. Further, were petitioner's view of amended Rule 23 (b) (3) adopted, all sorts of confusion would be created in the district courts, for "at the threshold point when the question of jurisdiction must be determined, it cannot be determined with certainty that there will ever be even an 'aggregate' in excess of $10,000."[20]

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[19] Some commentators have found the binding effect of the judgment under amended Fed. R. Civ. P. 23 (b) (3) noxious to the individual nature of our judicial system. See e. g., Supplemental Report, **Committee on Federal Rules of Civil Procedure, Judicial Conference—Ninth Circuit**, 37 F. R. D. 71 (1965).

[20] Consider, for example, the situation where the class is made up of 100 persons each having a claim of $110.00. If ten persons decide to be excluded, the court would not have the requisite $10,000.00 jurisdictional amount, even if arguendo, aggregation were permitted.

Frankel, **Some Preliminary Observations Concerning Civil Rule 23**, 43 F. R. D. 39, 50-51 (1967). This right of members of the class to request exclusion is proof that Fed. R. Civ P. 23 (b) (3), as amended, did not change the character of a plaintiff's right. See, Notes of the Advisory Committee on Rules, 28 U. S. C. A., Fed. R. Civ. P. 23, as amended February 28, 1966, effective July 1, 1966, at p. 71 (Cumulative Pocket Part 1967).

Accordingly, respondents submit that nothing short of a total overruling of the long standing aggregation doctrine can logically support petitioner's position. But to do so will greatly expand federal jurisdiction, thereby further taxing an already overly burdened Federal judiciary.[21] The decision below, in accord with the intention of Congress to limit rather than expand Federal diversity jurisdiction, should be affirmed.

CONCLUSION.

The decision below was proper under the facts alleged in the complaint and consonant with the well established doctrine that separate and distinct demands cannot be aggregated for purposes of jurisdictional amount, and also consistent with the amendment of Fed. R. Civ. P. 23, and with the prohibition of Fed. R. Civ. P. 82. Respondents submit that substantially more than mere "ancient learning" will have to be forgotten,[22] if th aggregation

[21] There has been much concern in the last decade over the increased workload of the Federal courts. Such increased workload prompted increasing the jurisdictional amount to $10,000.00 in 1958. See 2 U. S. Code Cong. & Ad. News 3099-101 (1958). Just two years later, Mr. Chief Justice Warren noted only a slight effect of the increased $10,000 jurisdictional amount on the workload. Warren, **Address at the Annual Meeting of the American Law Institute**, May 18, 1960, 25 F. R. D. 213-14 (1960).

[22] See, 2 Barron & Holtzoff, **Federal Practice and Procedure** § 569 (Supp., p. 89, 1966).

doctrine is no longer applicable. For all of the foregoing reasons, it is respectfully submitted that the judgment of the court below be affirmed.

Respectfully submitted,

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APPENDIX A.

Rule 23.

CLASS ACTIONS.

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or correspond-

ing declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any

member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and

that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. As amended Feb. 28, 1966, eff. July 1, 1966.